No. 42357-0-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

ELIU E. SANTOS,

Appellant,

vs.

UNITED PARCEL SERVICES INC.,

Respondent.

BRIEF OF APPELLANT SANTOS

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I. ASSIGNMENTS OF ERROR

A. Assignments

1. Finding of Fact No. 1 to the extent that it is not a complete recitation of the procedural facts in this claim. 1

2. Finding of Fact No. number 3 insofar as it states that Mr. Santos' low back condition, proximately caused by the November 17, 2003 industrial injury, did not worsen or become aggravated between December 8, 2005 and September 14, 2007.

3. Finding of Fact No. 4 insofar as it states that on February 2, 2007, while in Nebraska, Mr. Santos experienced a sudden and tangible event, when he jerked the crank on the landing gear of his trailer, which caused a herniation in his law back while he was a self-employed truck driver.

4. Conclusion of Law No. 1 insofar as it states that the Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of this appeal.

5. Conclusion of Law No. 2 insofar as it states that Mr. Santos' condition proximately caused by the November 17, 2003 industrial injury, did not worsen or become aggravated between December 8, 2005 and September 14, 2007 as contemplated by RCW 51.32.160.

6. Conclusion of Law No. 3 insofar as it states that on February 2, 2007, Mr. Santos experienced a sudden and tangible event to his low back while in Nebraska as a self-employer truck driver.

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1. Although designated a "Finding of Fact" the portion of Finding of Fact Numbers 3and 4 to which Mr. Santo's assigns error is actually a conclusion of law. The court will treat a conclusion of law as a legal conclusion, even if it is labeled a finding of fact. *McClendon v. Callahan*, 46 Wn. 2d 733, 740-41, 284 P.2d 323 (1955).

7. Conclusion of Law No. 4 insofar as it states that the September 14, 1007 order of the Department of Labor and industries is correct and is affirmed.

(1) Assignments of Error

1. The trial court erred in entering Conclusion of Law Number 1.[2]

2. The trial court erred in entering Conclusion of Law Number 2.

3. The trial court erred in entering Conclusion of Law Number 3.

4. The trial court erred in entering Conclusion of Law Number 4.

5. The trial court erred in affirming the determination that the Board of Industrial Insurance Appeals had jurisdiction over the current appeal and appeal issues.

6. The trial court erred in denying Appellant's Motion to Exclude and allowing the testimony of Theodore Becker, Ph.D.

7. The trial court erred in giving the Self-Insured Employers attending physician and industrial injury instructions, identified as Court instructions # 12 and 8.

II. APPELLANT'S STATEMENT OF THE ISSUES

1. Whether the Board below committed error by determining it had jurisdiction over an order denying reopening of an Industrial Insurance claim when the Department had never passed upon the closure of the claim?

2. Whether the Court below committed error when allowing the testimony of Theodore Becker, Ph.D?

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2 The trial court's Judgment and Order contains separate paragraphs with what amount to conclusions of law. In order to comply with RAP 10.4(a), appellant Santos has assigned error to each.

3. Whether the Court below committed error by offering the Self Insured Employer's attending physician instruction, renumbered as Court instruction # 12?

4. Whether the Court below committed error by offering the Self Insured Employer's industrial injury instruction, renumbered as Court instruction # 8?

III. APPELLANT'S STATEMENT OF THE CASE

On November 17, 2003, Appellant, Eliu Santos, sustained an industrial injury during the course of his employment with UPS. Certified Appeal Board Record (hereinafter "CABR"), at 50. The claim was allowed and benefits paid. Id. On April 8, 2005 the Department of Labor and Industries (Department) issued an order directing the payment of time loss compensation from January 8, 2005 through the date of the order and continuing as warranted by the facts of the case. The Self-Insured Employer appealed the April 8, 2005 on April 14, 2005. (CABR at 50) The Board of Industrial Insurance Appeals (Board), through its Order on Agreement of Parties dated November 22, 2005, directed the Department to enter an order closing the claim with a permanent partial disability award. The Department, by its ministerial order dated December 8, 2005, closed the claim with the agreed permanent partial disability award. Ministerial orders are not appealable. *In Re: Alfred Greenwalt*, BIIA Dec. 43,070 (1973).

On May 18, 2007 Mr. Santos filed an application to reopen his case. The Department denied the reopening request on September 14,

2007. Mr. Santos then appealed the Department's denial to the Board of Industrial Insurance Appeals. On February 13, 2008, the parties held a scheduling conference to determine potential issues on what appeared to be an aggravation case. During the scheduling conference, Industrial Appeals Judge Craig C. Stewart pointed out unusual circumstances by remarking that the Board of Industrial Insurance Appeals may have exceeded its jurisdiction by granting the Order on Agreement of Parties and issuing a ministerial order as to a Category 3 Permanent Partial Disability Award. The only order before the Board of Industrial Insurance Appeals which preceded the Order on Agreement of Parties was a Time-Loss Compensation Payment Order dated April 8, 2005.

On February 20th, 2008 Mr. Santos filed a Motion to Remand at the Board arguing that the Board lacked jurisdiction to hear the issue of aggravation as the claim had never been closed. The Board denied Mr. Santos' Motion and hearing were held to determine whether or not Mr. Santos' industrially related conditions had worsened.

At the Board of Industrial Appeals, the Self-Insured Employer, United Parcel Services (hereinafter "UPS") initiated a perpetuation deposition of Dr. Theodore J. Becker, Ph.D. to discuss and evaluate the possibility of injury resulting from the work Mr. Santos was performing at the time he aggravated his prior low back condition. Dr. Becker is a

professionally licensed physical therapist in the state of Washington. (CABR 7/31/08 Deposition of Theodore J. Becker at p. 7). Dr. Becker holds a master's degree in sports science and sports medicine and he obtained a Ph.D. in human performance. *Id.* Dr. Becker does not hold a medical degree. *Id.* Dr. Becker's only professional licensure in the state of Washington is in physical therapy. (CABR 7/31/08 Dep. of Becker, p. 44 ln. 12-14).

On February 8, 2008, discovery requests were served on opposing counsel. The discovery requests were received by opposing counsel on February 11, 2008. On May 30th of 2008, Dr. Becker was confirmed as a witness. (CABR Dep. of Becker, p. 4-5). When additional discovery was requested, opposing counsel stated that it would be provided if Dr. Becker was to be called to testify. *Id* at 5. Discovery was not provided despite the aforementioned assurances. *Id* at 4. One week prior to Dr. Becker's perpetuation deposition and after Mr. Santos had rested his case in chief, opposing counsel faxed a copy of the report Dr. Becker was to use in his testimony. *Id* at 5.

On December 11, 2008 the Industrial Appeals Judge Stewart issued a Proposed Decision and Order which concluded that: 1) the Board had jurisdiction over the parties and the subject matter of the appeal; and 2) that Mr. Santos' condition proximately caused by the November 17,

2003 industrial injury did not worsen. On January 27, 2009 Mr. Santos filed a Petition for Review, asking the Board to review IAJ Stewart's proposed decision and order, re-raising the jurisdictional issue and setting forth his basis for why the IAJ's decision was incorrect regarding the issue of worsening. On February 17, 2009 the Board issued an Order denying Mr. Santos' Petition for Review. (Clerks Papers, hereinafter CP at 4). On March 13th, 2009 Mr. Santos appealed his case to Pierce County Superior Court.

A jury trial was then held on May 10, 2011 in Pierce County Superior Court. VRP 5/10/11. Prior to the beginning of the case, Mr. Santos' filed a Motion to Strike the testimony of Defense witness, Theodore Becker, Ph.D. VRP 5/10/11 at 4-11. Arguments were heard by the Honorable Katherine M. Stoltz on May 10th, 2011. *Id.* The Defendant argued that the purpose of Dr. Becker's testimony was to "lay a foundation based upon human performance on data . . . that *can be used by the medical experts* to testify about causation." VRP 5/10/11 at 8-9. Careful review of defense medical experts, Dr. Sarno and Dr. Bay's testimony, neither medical witness relied upon Dr. Becker's testimony nor his "human performance data" when rendering opinions on causation. Judge Stoltz denied the Plaintiff's Motion to Strike, ruling that Dr. Becker's testimony would be read to the jury. *Id.*

Prior to closing, the Court heard arguments and exceptions by the respective parties in regards to the Court's proposed jury instructions. VRP 5/16/11 at 45-64. The Plaintiff took exception to the Court's instruction # 11 which was the Defendant's instruction # 12 regarding the attending physician; Court's instruction #8 which was Defendant's instruction #16 regarding the definition of an industrial injury. *Id at 49.*

After opening statements, testimony and closing arguments, the jury returned a verdict on May September 26, 2008 affirming the Board of Industrial Insurance Appeals Decision and Order. VRP 9/26/08 at, 3. On February 4, 2009 Judgment was filed in Superior Court. CP at, 110-112.

On February 24, 2009 Mr. Santos filed a Notice of Appeal to this Court.

IV. STANDARD OF REVIEW

(1) Standard of Review

Judicial review of matters arising under the Industrial Insurance Act is governed by RCW 51.52.110 and RCW 51.52.115. *Ball-Foster Glass Container Co. v. Giovanelli*, 128 Wn. App. 846, 849, 117 P.3d 365 (2005). The hearing in the superior court is de novo. RCW 51.52.115. When a party appeals from a decision of the Board and the superior court affirms the Board's decision, this Court's inquiry is the same as that of the superior court. *Littlejohn Construction Co. v. Dep't of Labor & Indus.*, 74

Wn. App. 420, 423, 873 P.2d 583 (1994). Appellate review is limited to the evidence and testimony presented to the Board. *Stelter v. Dep't of Labor & Indus.*, 147 Wn.2d 702, 707, 57 P.3d 248 (2002).

(2) Statutory Interpretation Under Title 51

Courts must liberally construe the Industrial Insurance Act in favor of the injured worker. Title 51 RCW has its own rule of statutory construction, in RCW 51.52.010, which provides, in relevant part:

> This title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.

In this state, injured workers' rights to benefits are statutory. Washington's workers' compensation law was enacted in 1911, the result of a compromise between employers and workers such that "sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy." RCW 51.04.010. Workers receive less than full tort damages but are spared the expense and uncertainty of litigation. *See Dennis v. Dep't of Labor & Indus.*, 109 Wash.2d 467, 469-70, 745 P.2d 1295 (1987).

The Industrial Insurance Act mandates that its provisions be "liberally construed for the purpose of reducing to a minimum the

suffering and economic loss arising from injuries and/or death occurring in the course of employment." RCW 51.12.010. Courts, therefore, are to resolve doubts as to the meaning of the IIA in favor of the injured worker. *Kilpatrick v. Dep't of Labor & Indus.*, 125 Wash.2d 222, 230, 883 P.2d 1370, 915 P.2d 519 (1994). Note that it is not any particular portion of Title 51 that is to be liberally construed. Rather, it is the *entire statutory scheme* that receives the benefit of that construction.

Each statutory provision should be read by reference to the whole act. "We construe related statutes as a whole, trying to give effect to all the language and to harmonize all provisions." *Guijosa v. Wal-Mart Stores, Inc.*, 101 Wn. App. 777, 792, 6 P.3d 583 (2000), *aff'd*, 144 Wn.2d 907, 32 P.3d 250 (2001). The Supreme Court noted:

> Historically, this Court has followed the rule that each provision of a statute should be read together with other provisions in order to determine legislative intent. "The purpose of reading statutory provisions in pari materia with related provisions is to determine the legislative intent underlying the entire statutory scheme and read the provision 'as constituting a unified whole, to the that a harmonious, total statutory scheme evolves, which maintains the integrity of the respective statutes."

In re Estate of Kerr, 134 Wn.2d 328, 336, 949 P.2d 810 (1998), *citing State v. Williams*, 94 Wn.2d 531, 547, 617 P.2d 1012 (1980).

In addition to liberal construction, Washington courts have mandated that doubts as to the meaning of the workers' compensation law

be resolved in favor of the worker. *See, Clauson v. Department of Labor and Industries*, 130 Wn. 2d 580, 586, 925 P.2d 624 (1996)(where a worker who had been awarded a permanent total disability pension under one worker's compensation claim received a permanent partial disability award for a prior injury under a separate, pre-existing claim. Where the court held that the timing of the closure of claims should not work to the disadvantage of an injured worker.); *see also, McClelland v. ITT Rayonier Inc.*, 65 Wn. App. 386, 828 P.2d 1138 (1992)(a case involving an employee's claim for worker's compensation benefits for an aggravation of his psychological condition of major depression coupled with simple phobia).

(3) The Act's Purpose and Policies when Looking at this Case.

In order for a proper understanding of the importance of this case and the issues presented, it is important to first look at what brought about Washington's Industrial Insurance Act and the policies and presumptions that came with it.

The Industrial Insurance Act was established to protect and provide benefits for injured workers. As noted for many years by the courts, the enactment of the Industrial Insurance Act in 1911 by the Washington State Legislature was due to a, "finding that the remedy of the injured workman had been uncertain, slow and inadequate. . . ." 1911

Wash. Law, ch. 74: *see, e.g. Lee v. Department of Labor and Industries*, 81 Wn. 2d 937, 506 P.2d 308, 309 (1973)(a case involving a Mandamus proceeding by injured workman to compel director of labor and industries to obey and carry out order of board of industrial insurance appeals directing department of labor and industries to provide workman additional treatment). The declared purpose of the Act was to provide sure and certain relief for injured workmen. *Id.*

The Washington Supreme Court has long held that the Industrial Insurance Act is to be liberally applied in favor of the injured worker. The court stated in *Johnson v. Department of Labor and Industries*, 134 Wn. 2d 795, 953 P.2d 800 (1998). "We have previously recognized the change in the common law brought about by the Legislature's enactment of the Industrial Insurance Act and that the Act is remedial in nature and 'is to be **liberally applied** to achieve its **purpose of providing compensation to all covered persons injured** in their employment.'" 134 Wn. 2d at 799, 953 P.2d at 802. (Emphasis added)(Quoting *Sacred Heart Med. Ctr. v. Carrado*, 92 Wn.2d 631, 635 (1979)).

As the cases above establish, the Industrial Insurance Act was enacted to compensate as fully as possible workers injured on the job. With the long standing policy of liberal construction of the Act in favor of the worker, the remedial nature of the act, in conjunction with the mandate

that any doubt be resolved in favor of the worker, supports a finding by this Court reversing the superior court's ruling as it relates to the affirmance of the Board's jurisdiction determination, the allowance of the testimony of Theodore Becker, Ph.D., and the giving of the Self-Insured Employer's instructions regarding attending physician and industrial injury definition as those determination are contrary to the underlying policies of the Industrial Insurance Act.

V. ARGUMENT FOR REVERSAL

(1) The Board exceeded its scope of review.

a. The Superior Court and the Board of Industrial Insurance Appeals' jurisdiction is appellate in nature, and therefore limited to the issues first passed upon by the Department of Labor and Industries.

When a Court analyzes its scope of review the Court should be mindful of RCW 51.52.060 and 51.52.115 which provides that both the Board and the superior court serve a purely appellate function, and the principle that the Board and superior court's jurisdiction are appellate only.

It is well established that the Board and subsequently the superior court's appellate authority is strictly limited to reviewing the specific Department action. The Board hears appeals de novo. RCW 51.52.100. The superior court reviews the Board action on the Board's record. *See*

Hanquet v. Department of Labor & Indus., 75 Wash.App. 657, 661-64, 879 P.2d 326 (1994), *review denied*, 125 Wash.2d 1019, 890 P.2d 20 (1995) *citing, Lenk v. Department of Labor & Indus.*, 3 Wash.App. 977, 982, 478 P.2d 761 (1970) ("[I]f a question is not passed upon by the Department, it cannot be reviewed either by the Board or the superior court."). "[W]e find no warrant in the statutory enumeration of the Board's powers, past or present, for the contention that the board can, on its own motion, change the issues brought before it by a notice of appeal and enlarge the scope of the proceedings." *Brakus v. Department of Labor & Indus.*, 48 Wash.2d 218, 223, 292 P.2d 865 (1956).

To ascertain whether the board and / or the superior court acted within its proper scope of review this Court must look to the provisions of the order appealed to the Board. The questions the Board and superior court may consider and decide are fixed by the order from which the appeal was taken (*See Woodard v. Department of Labor and Indus.*, 188 Wash. 93, 61 P.2d 1003 (1936)) as limited by the issues raised by the notice of appeal (*See Brakus v. Department of Labor and Indus.*, 48 Wash.2d 218, 292 P.2d 865 (1956)). Further in *Leary v. Department of Labor & Indus.*, 18 Wash.2d 532, 540-41, 140 P.2d 292 (1943), the Court held that the Act confers purely appellate authority upon the Board and the courts in cases under Title 51.

Based upon the statutory sections as well as the well-established case law, if a question is not passed upon by the Department, it cannot be reviewed by either the Board or the superior court.

b. Appellate Rules Applicable to Jurisdiction

As noted above the superior court acts in an appellate capacity when reviewing an appeal taken from the Board. If one looks to the Rules of Appellate Procedure it is well established that the issue of jurisdiction can be raised for the first time on appeal. Rule of Appellate Procedure 2.5. Circumstances Which May Affect Scope Of Review, states in pertinent part:

> (a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, **a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction**, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction.

Pursuant to RAP 2.5(a)(1) the Plaintiff was able to raise for the first time the issue of jurisdiction regarding the decision of the Board as well as the superior court jurisdiction regarding any issue not first addressed by the Department.

c. The Order on Agreement of Parties in 2005 Was Invalid as the Order on Appeal to the Board of Industrial Insurance Appeals Involved a Time-Loss Order Not a Closing Order.

Washington Administrative Code 263-12-010, entitled Function and Jurisdiction, states that it is the function of the Board of Industrial Insurance Appeals as an agency to review, hold hearings on, and decide appeals filed from final orders, decisions, or awards from the Department of Labor and Industries. The jurisdiction of the Board of Industrial Insurance Appeals extends to appeals arising under the Industrial Insurance Act (Title 51 RCW).3 Further, to ascertain whether the Board of Industrial Insurance Appeals acted within its proper scope of review, you look to the provisions of the order appealed to the Board of Industrial Insurance Appeals.

In addition, the questions that the Board of Industrial Insurance Appeals may consider and decide are fixed by the order under which the appeal was taken. *C.W. Lenk v. Department of Labor and Industries*, 3 Wn.App. 977, 478 P.2d 761 (1970). *See Woodard v. Department of Labor and Industries*, 188 Wash. 93, 61 P.2d 1003 (1936). Moreover, the Department of Labor and Industries is the sole tribunal with power to determine facts and its findings are reviewable only on appeal. *Kingery v.*

3 Whenever the Department has taken any action or made any decision relating to any phase of the administration of this title the worker, beneficiary, employer, or other person aggrieved thereby may request reconsideration of the Department or may appeal to the Board. 51.52.060.

Department of Labor and Industries, 132 Wn.2d 162, 937 P.2d 565 (1997). The Board of Industrial Insurance Appeals' appellate authority is strictly limited to reviewing specific Department of Labor and Industries action. *Id.* The Industrial Insurance Act confers purely appellate authority upon the Board of Industrial Insurance Appeals and denies them any authority over un-appealed final Workers' Compensation Orders of the Department of Labor and Industries. *Id.*

Nowhere under the April 8, 2005 time-loss order were issues presented that gave the Board of Industrial Insurance Appeals authority to reach an Order on Agreement of Parties passing upon claim closure and permanent partial disability. At no time prior to April 8, 2005 had the Department passed upon the closing of Mr. Santo's Labor and Industries claim, or upon any Permanent Partial Disability Award. The procedure used by the Board of Industrial Insurance Appeals in issuing the Order on Agreement of Parties exceeded its jurisdiction as it relates to the closure of Mr. Santos' claim. The Board in issuing an Order of Agreement by Parties mandated the Department to close Mr. Santos's claim, and this led to the ministerial Category 3 Permanent Partial Disability order which is not appealable. The Board directed this claim closure and not the Department, when the determination actually belongs in the Department's province.

In *Brakus v. Department of Labor and Industries*, 48 Wn.2d 218, 292 P.2d 865 (1956), the Court held that there is no warrant in the statutory enumeration of the Board of Industrial Insurance Appeals' powers, past or present, for the contention that the Board of Industrial Insurance Appeals can, on its own motion, change the issues brought before it by a notice of appeal and enlarge the scope of the proceedings. Allowing the Board of Industrial Insurance Appeals to make this ruling is contrary to *Kingery and Brakus*, and essentially allows the Board of Industrial Insurance Appeals to step into the Department of Labor and Industries' shoes to determine facts and findings.

It appears that all of the parties were in agreement that the case should be closed with a Category 3 permanent partial disability award. Unfortunately, the avenue taken by the Board of Industrial Insurance Appeals cannot be resolved by an agreement of the parties.

The Order of Agreement of Parties is invalid as jurisdiction cannot be stipulated to by the parties. For example, in *Sullivan v. Purvis*, 90 Wn.App. 456, 966 P.2d 912 (1998), the Court of Appeals of Washington, Division 3, held that jurisdiction cannot be conferred by agreement or stipulation of the parties. Here, the parties, under an Order of Agreement attempted to stipulate to jurisdiction, which is contrary to this holding. Any judgment entered without jurisdiction is void, and therefore, the

Board of Industrial Insurance Appeals is without jurisdiction and Mr. Santos's claim should be remanded to the Department of Labor and Industries for further adjudication. *Sullivan v. Purvis*, 90 Wn.App. 456, 458, 966 P.2d 912 (1988).

RCW 51.32.160 entitled "Aggravation, diminution, or termination," provides in part:

> (1)(a) If aggravation, diminution, or termination of disability takes place, the director may, upon the application of the beneficiary . . . from the **date the first closing order becomes final** . . .
>
> (b) "Closing order" as used in this section means an order based on factors which include medical recommendation, advice, or examination.

For purposes of an aggravation claim, there are two significant dates involved in a determination to reopen a labor and industries claim. The "second terminal date" is date of most recent closure or denial of an application to reopen claim for aggravation, and the "first terminal date" is date of last previous closure or denial of such application. *Grimes v. Lakeside Industries*, 78 Wash.App. 554, 897 P.2d 431 (1995). For a workers' compensation claimant to prove aggravation, the injured worker must first establish that injury became aggravated between first and second terminal dates. *Id.*

In Mr. Santos' case, there is actually no first-terminal date since the April 8, 2005 order under appeal was actually a Time-Loss Payment Order, and therefore, cannot be construed as a closure. The proper first terminal date in an aggravation case is the date of closure, however, in this case, as has been demonstrated, the April 8, 2005 order under appeal did not address closure. Since Mr. Santos' claim had not been properly adjudicated by the Department, the Reopening Application filed by the Appellant, should not have been treated as a Reopening Application, but rather as a claim for additional benefits.

It is submitted that it is unfortunate that the parties failed to properly address their intentions to settle the matter, and that the Board of Industrial Insurance Appeals in its good faith attempt to resolve the matter exceeded its jurisdiction. Mr. Santos' claim still remains at the Department level for further adjudication. Therefore, the Board of Industrial Insurance Appeals does not have jurisdiction over the denial of the reopening because the claim has not yet been properly closed.

(2) Dr. Becker's testimony should have been excluded because it was beyond his area of expertise, prejudicial, irrelevant, and had potential to create confusion

The use of expert witness testimony is governed by Rule 702 of the Washington Rules of Evidence. Rule 702 allows the use of expert witnesses "[i]f scientific, technical or other specialized knowledge will

assist the trier of fact to understand evidence or to determine a fact in issue..." Wash. R Evid. 702. The admissibility of any testimony offered by expert witnesses "depends upon three factors: whether (1) the witness qualifies as an expert, (2) the opinion is based upon explanatory theory generally accepted in the scientific community, and (3) the expert testimony would be helpful to the trier of fact." *State v. Ciskie*, 110 Wash. 2d 263, 751 P.2d 1165 (1988).

a. Dr. Becker's testimony was outside of the scope of his area of expertise.

The testimony that Dr. Becker provided in this case was presented to directly dispute the medical causation determinations proffered by Dr. Johnson. (CABR Dep. of Becker, p. 32, ln. 23 – p. 33, ln. 3)(CABR Dep. of Becker p. 33, ln. 23 – p. 35, ln. 12). Dr. Becker is only licensed in Washington State as a physical therapist; he is not a medical doctor. An expert's opinion is admissible if the witness is properly qualified, relies on generally accepted theories, and the expert's testimony is helpful to the trier of fact, construing "helpfulness" broadly. *Philippides v. Bernard* 151 Wash.2d 376, 88 P.3d 939, as amended (2004).

Dr. Becker never met with Mr. Santos and based his opinions off depositions and medical records. He provided improper conclusions about medical causation on a number of occasions throughout his

testimony. First, Dr. Becker asserted that a disc herniation could have been caused by the activity Mr. Santos was performing without prior herniation (CABR Dep. of Becker, p. 35, ln. 15-18). Dr. Becker also asserts that Mr. Santos could have injured his back while lowering the landing gear even without a prior injury. (CABR Dep. of Becker, p. 35, ln. 21-24). Furthermore, Dr. Becker testified that he disagreed with Dr. Johnson's medical evaluation, in which he indicated that it was his opinion that the force applied by Mr. Santos in the action causing his aggravation would have been insufficient to cause injury if there had not been a preexisting injury present. (CABR Dep. of Becker, p. 32, ln. 22 – p. 33, ln. 3).

By allowing Dr. Becker's testimony to be presented to the trier of fact Mr. Santos was prejudiced as the testimony was beyond the scope of Dr. Becker's expertise and was irrelevant and potentially confusing. When an expert's opinion is based on theoretical speculation and strays beyond his or her area of expertise, it is properly excluded. *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wash.App. 722, 959 P.2d 1158, review granted 137 Wash.2d 1013, 978 P.2d 1099, reconsideration denied, reversed in part 138 Wash.2d 248, 978 P.2d 505, (1998) reconsideration denied (1999). Dr. Becker's testimony should have been excluded as it had no potential to "assist the trier of fact to understand the evidence or determine a fact in issue." *Davidson v. Mun. of Metro. Seattle*, 43

Wn.App. 569, 719 P. 2d 569 (Div. 1 1996). Dr. Becker's testimony fails to assist the trier of fact due to the high potential to mislead and confuse any potential trier of fact because it contains extensive medical terminology and presents improper medical conclusions. Furthermore, Dr. Becker discussed his affiliation with the University of Washington Medical School and, although it is correct, opposing counsel's use of the term "doctor" to refer to Dr. Becker throughout his testimony creates a potential to mislead an average juror or trier of fact who fails to see the distinction between a medical doctor and an academic doctor. (CABR Dep. of Becker, p. 10, ln 23 – p. 11, ln 3) (CABR Dep. of Becker p. 10, ln. 4-5)(Q. "Doctor, have been affiliated...")(Q. Have you had or played any role with the University of Washington Medical School? A. I have...") (CABR Dep. of Becker, p. 30, ln. 20-24)("Based on your doctoral education..."). Although the case law is clear that Dr. Becker does not have the qualifications to offer medical opinions or comment upon the legitimacy of Mr. Santos's injury, the allowance of his testimony when looking at Dr. Becker's extensive use of medical terminology, his association with medical schools and organizations, and his title as doctor, a juror could unwittingly determine that Dr. Becker has the authority to offer the medical opinions contained within his testimony.

b. Dr. Becker's testimony regarding a singular study to support his opinions should have been excluded as that study was not generally accepted in the relevant scientific community.

Under ER 702, scientific literature / theory is only admissible if the theory has achieved general acceptance in the relevant scientific community. In this case, Dr. Becker's testimony did not qualify under ER 702 in that a majority of the data and opinions that Dr. Becker presented were based upon little foundation and a single study. Dr. Becker never interviewed or examined Mr. Santos and the majority of his opinions were based on research conducted by examining other truck drivers, in other locations, working with other trucks and equipment. (CABR Dep. of Becker, p. 40 ln. 17 – p. 44 ln. 10). Expert testimony concerning evidence derived from a scientific theory is admissible only if the theory has achieved general acceptance in the relevant scientific community; this rule is concerned only with whether the expert's underlying theories and methods are generally accepted. *Ruff v. Department of Labor and Industries of State of Wash.*, 107 Wash.App. 289, 28 P.3d 1 (2001).

There is no indication anywhere in the record that Dr. Becker performed an analysis on any of the equipment Mr. Santos was working with or ever saw the trailer that Mr. Santos was working on at the time of the aggravation. There is also no analysis of any individual variable

factors such as Mr. Santos height, weight, or age that could have contributed to Mr. Santos's injury. Instead, Dr. Becker based his determinations on a study involving the frequent use (up to 24 times a day) of equipment that could potentially be similar and a study "designed to sell landing gear commercially." (CABR Dep. of Becker, p. 44 ln. 9-10). Neither study, nor the opinions Dr. Becker extrapolated from those studies, can help to prove or disprove causation in this case. Dr. Becker's opinions are based purely on conjecture, they are based on facts that were dissimilar to Mr. Santo's event, and they can do nothing to prove Mr. Santo's assertion that his low back injury was aggravated while working is more or less probable. As a result, Dr. Becker's testimony is highly prejudicial and provides little to no probative value when determining the ultimate issue of causation in this case.

Due to the prejudicial nature, the potentially confusing content, and the fact that it provides no relevant information, Dr. Becker's testimony should have been precluded from evidence. Dr. Becker's testimony was misleading, took the form of medical testimony and provided medical assessments that conflict with valid medical diagnoses without the foundational authority to do so. Additionally, Dr. Becker provided an analysis of Mr. Santos's actions based on data gleaned from studies that are dissimilar and cannot provide any information as to the

likelihood of Mr. Santos's aggravation of a preexisting injury resulting from the work he was performing.

c. Dr. Becker's testimony should be excluded due to the prejudice caused by the delay of opposing counsel's failure to disclose his report.

In Washington, discovery procedures are governed by the general provisions of Washington Court Rule 26. Supplementation of responses are addressed in Section (e) of Wash. C.R. 26. Section (e) states that "[a] party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired..." Wash. C.R. 26(e). However, there are exceptions to the "no duty" provision of Wash. C.R. 26. located at Section (e)(1) through Section (e)(4) of the rule. Section (e)(1) states that "[a] party is under a duty seasonably to supplement his response with respect to any question directly addressed to:

> (a) The identity of persons having knowledge of discoverable matters; and
>
> (b) The identity of each person expected to be called as an expert witness a trial, the subject matter on which he is expected to testify, and the substance of his testimony."

Wash. C.R. 26(e)(1).

"The purposes of interrogatories are, in part, to enable the opposing party to prepare for trial and avoid surprise." *Lampard v. Roth*, 38 Wn.App. 198, 201, 684 P.2d 1353 (1984). (citing *Stark v. Allis-Chalmers*, 2 Wn.App. 399, 404, 367 P.2d 854 (1970). To prevent prejudice due to a lack for preparation because of surprise, "Washington's discovery rules give trial courts broad discretion to sanction parties for discovery violations." *Hyundai Motor America v. Magana*, 170 P. 3d 1165, 1172 (2007). "CR37(d) authorizes sanctions, including sanctions set forth in CR37(b)(2), for failure to respond to interrogatories and requests for production." *Id.* The court should exclude testimony if there is a showing of intentional or tactical nondisclosure, but in *Miller v. Peterson*, the court noted that the most important factor in its determination [to exclude a certain witnesses' testimony] was the prejudice to the party opposing the testimony..." *Lampard*, 38 Wn. at 202; *Hampson v. Ramer*, 47 Wn. App. 806, 813, 737 P.2d 298 (1987)(Summarizing *Miller v. Peterson*, 42 Wn. App. 822, 825). In *Lampard v. Roth*, the court stated that they were "forced to conclude that [the] actions or omission constitute willful failure to comply with the discovery rules" when no reason was given for the failure to respond to and supplement interrogatories or comply with an order. *Lampard*, 38 Wn. App at 201-02 (Noting that

Lampard's failure to respond promptly to interrogatories concerning expert [was] particularly grievous).

In the present situation, Dr. Becker was disclosed as a witness on May 30th of 2008. (CABR Dep of Becker, pp. 4). Prior to commencement of Mr. Santos's case, additional discovery materials were requested and opposing counsel's office indicated that discovery would be provided if Dr. Becker was to testify. *Id* at 5, 55. Despite the assurances given by opposing counsel, no additional discovery materials were provided. Furthermore, the information Dr. Becker relied upon in his testimony was provided one week prior to the perpetuation deposition. By that time, Mr. Santos had already rested his case in chief and was unable to address the assertions made by Dr. Becker in his report or during his deposition. Furthermore, Mr. Santos was unable to gather expert testimony to refute the claims made by Dr. Becker or provide a witness in his case in chief that could critique or review any of Dr. Becker's arguments. As a result, all of the assertions that Dr. Becker made were reflected in the record unopposed due to the delay imposed by opposing counsel. This prevented Mr. Santos from adequately preparing in his case in chief and limited counsel from adequately preparing cross-examination materials for Dr. Becker's deposition. The only explanation that opposing counsel offered to explain the failure to provide information regarding the interrogatory

request about Dr. Becker was that they were unaware of what the issues in the case would be. (CABR Dep. of Becker, p. 49-56). However, the issues of the case were clearly delineated in the scheduling of the case which took place on February 13, 2008. (CABR at 54). Although litigation began in early July, interrogatory requests were still not answered by July 31, 2008 when Dr. Becker was deposed. Mr. Santos was prejudiced by these actions, as a remedy, Dr. Becker's testimony should have been suppressed.

(3). The Court's Instruction #12 Regarding the Attending Physician Presumptively Affected the Outcome of the Trial.

"Jury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied." *Ezell v. Hutson*, 105 Wn.App. 485, 488, 20 P.3d 975 (2001) (quoting Robertson v. State Liquor Control Bd., 102 Wn.App. 848, 860, 10 P.3d 1079 (2000), review denied, 143 Wn.2d 1009 (2001)), review denied, 144 Wn.2d 1011 (2001).

Appellate Courts review de novo whether an instruction is an error of law. *Id.* But the giving of a particular instruction is reviewed for an abuse of discretion. *Thomas v. Wilfac, Inc.*, 65 Wn.App. 255, 264, 828 P.2d 597, review denied, 119 Wn.2d 1020 (1992). An instruction that contains a misstatement of the applicable law is reversible error when it

causes prejudice. *Ezell*, 105 Wn.App. at 488. Error is not prejudicial unless it affects or presumptively affects the outcome of the trial. *Thomas v. French*, 99 Wash.2d 95, 104, 659 P.2d 1097 (1983).

Appellate Courts review de novo the instructions in their entirety in order to determine whether the instructions are misleading or incorrectly state the law, which results in prejudice to the objecting party. *Furfaro v. City of Seattle*, 144 Wn.2d 363, 382, 27 P.3d 1160, 36 P.3d 1005 (2001). If an improper jury instruction results in prejudice to the objecting party, a new trial should be ordered. *Id.*

a. The giving of Court's Instruction #12 was improper and resulted in prejudice to Mr. Santos.

The instruction on attending physicians need not always be given. In *Boeing Co. v. Harker-Lott*, 93 Wn.App. 181, 186–88, 968 P.2d 14 (1998), the court upheld the trial judge's refusal to give WPI 155.13.01 as being within the range of discretion. The appellate court gave three reasons for its holding: a more general instruction was given that allowed the plaintiff to argue "special consideration" to the jury, **the testimony of the attending physicians was in conflict**, and the proposed instruction did not involve esoteric concepts that were key to the plaintiff's case. *Harker-Lott*, 93 Wn.App. at 188.

In Mr. Santo's case, as in *Harker-Lott*, the attending physician instruction should not have been given. First and foremost, there was a dispute as to who was "the attending physician." The Defendant called Dr. Sarno, who evaluated Mr. Santos in the emergency room, and the Plaintiff, called Dr. Johnson who filed Mr. Santos' reopening application. A review of Dr. Sarno's deposition dated August 14, 2008, it is apparent that Dr. Sarno was only an emergency room physician who evaluated Mr. Santo's onetime on February 2, 2007. (CABR Sarno dep at 17). Dr. Sarno did not testify that he was Mr. Santos' attending physician. The same is true with Dr. H. Richard Johnson. As both physicians only evaluated Mr. Santos on one occasion, during the dates in question, and the doctors' opinions were in conflict it was error for the judge to give the attending physician instruction.

With the purpose of the Industrial Insurance Act in conjunction with the guiding principles of the Act, it follows that the superior court's allowance of the Self-Insured's jury instruction was error. Court's instruction #12 was not necessary and resulted in prejudice to the Plaintiff / Appellant.

(4). The Court's giving of Instruction # 8 was Error.

The Defendant's May 5, 2011 proposed instructions offered, per instruction number 16, the definition of an industrial injury, which was

remunerated as Court Instruction #8. Plaintiff / Appellant objected to the instruction on the basis that the sole question for the jury was whether or not an already accepted industrial injury had become aggravated. As Mr. Santos already had an accepted industrial injury, the giving of instruction number 8 created a heightened potential for juror confusion, because much of the testimony allowed the jury to speculate about whether the 2007 incident was a new injury versus an aggravation.

Based upon the purpose of the Industrial Insurance Act in conjunction with the guiding principles of the Act, it follows that the superior court's allowance of the Self-Insured's jury instruction was error. Court's instruction #8 was not necessary and resulted in prejudice to the Plaintiff / Appellant.

(5). Santos is Entitled to Attorney Fees on Appeal

If the Court agrees with Santos that the trial court here should be reversed, Santos is entitled to an award of reasonable attorney fees on appeal. RAP 18.1; RCW 51.52.130; *Brand v. Dep't of Labor & Industries*, 139 Wn.2d 659, 989 P.2d 1111 (1999).

VI. CONCLUSION

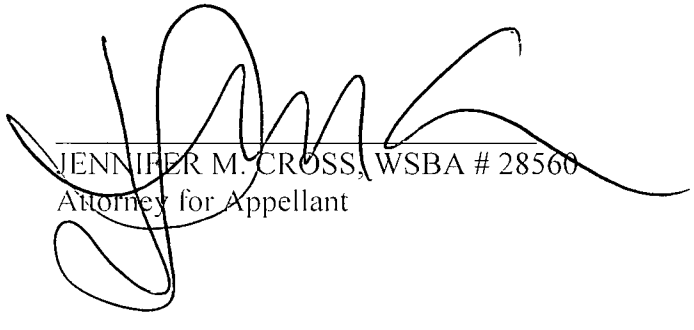
Washington's Industrial Insurance Act was enacted to provide injured workers sure and certain relief. As seen in the above cases, this

relief was to be provided to the fullest extent possible as allowed under the Act. Pursuant to the above case law, the Court committed error when it affirmed the Board's determination regarding jurisdiction, allowed the testimony of Theodore Becker and finally adopted the Self-Insured Employer's attending physician and industrial injury definition instructions.

Mr. Santos respectfully requests this Court to reverse the superior court's judgment and remand this matter back to the Department of Labor and Industries with a finding that the Board did not have jurisdiction to adjudicate an aggravation application as the claim was never closed. In the alternative, Mr. Santos respectfully requests this Court to reverse the superior court's judgment and remand this matter back to the Superior Court for a new trial based upon the above listed arguments.

DATED this 1 day of February, 2012.

DAVID B. VAIL & ASSOCIATES



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CERTIFICATE OF MAILING

SIGNED at Tacoma, Washington.

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the _____ day of February, 2012, the document to which this certificate is attached, Brief of Appellant Santos, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

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DATED this 2nd day of February, 2012.

Lynn M. Venegas
LYNN M. VENEGAS, Secretary